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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)		RECEIVED
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Petition for Rulemaking to	)	RM No. 9097	JUL 17 1997
Amend 47 C.F.R. Section 76.1003 - -	)		
Procedures for Adjudicating	)		FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
Program Access Complaints	)		

To: Cable Services Bureau

REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments in support of the above-captioned petition for rulemaking filed by Ameritech New Media, Inc. (the "Ameritech Petition").

In its initial comments in this proceeding, WCA submitted substantial evidence indicating that recent marketplace developments within the cable and wireless cable industries will likely require the Commission's staff to devote more resources to program access matters, and that it therefore would be prudent for the Commission to consider the limited changes to its program access rules proposed by Ameritech.[1/] Not surprisingly, the cable industry has come out in full force against the Ameritech Petition, largely on the theory that the rule amendments suggested by Ameritech are unnecessary to promote competition. Time Warner Cable, for example, cites the subscriber growth of DBS and Ameritech's own overbuild efforts as proof that the Commission's program access rules are working as intended by Congress.[2/] The National Cable Television Association likewise cites

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[1/] *See* Comments of The Wireless Cable Association International, Inc., RM 9097, at 2-9 (filed Jul. 2, 1997) [the "WCA Comments"].

[2/] Comments of Time Warner Cable, RM-9097, at 3-5 (filed Jul. 2, 1997).

the limited growth of alternative multichannel video programming distributors ("MVPDs") in concluding the program access rules require no modification at this time.[3/]

AC respectfully submits that the cable industry misses the point: it is well established that a Commission decision must sometimes rest on judgment and prediction rather than be based solely on the situation that exists at the time of the decision.[4/] In such cases, the Commission is well within its authority to adopt prophylactic rules aimed at resolving problems that had not yet fully materialized, since "'a forecast of the direction in which future public interest lies necessarily involves decisions based on the expert knowledge of the agency.'"[5/] The Commission is not, as suggested by the cable industry, required to defer consideration of Ameritech's proposal until competition from alternative MVPDs is obliterated by widespread abuses of the program access rules. Indeed, given the pro-competitive policies that are at the heart of the 1992 Cable Act, it is impossible to argue that such a posture would serve the public interest. The Commission thus is well within its authority to take a proactive stance and consider rule changes in anticipation of marketplace developments which, as demonstrated in WCA's initial comments, are likely to place alternative MVPDs at a further disadvantage when attempting to acquire popular cable programming on fair and equitable terms from vertically integrated programmers.

Moreover, as demonstrated by the facts surrounding the Cable Services Bureau's recent program access decision in favor of Bell Atlantic Video Services Company ("BVS"), under the

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[3/] Comments of the National Cable Television Association, RM-9097, at 11 (filed Jul. 2, 1997).

[4/] *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1980).

[5/] *Id.* at 594-5 (footnote omitted).

Commission's current rules vertically integrated programmers have considerable incentive to engage in dilatory conduct when negotiating program affiliation contracts with alternative MVPDs. The record in the BVS case reflects that prior to the filing of its complaint BVS endured nearly seven months of canceled meetings, unreturned telephone calls and other obstructions imposed by Rainbow Programming Holdings, Inc. when BVS attempted to negotiate an affiliation agreement for SportsChannel New York.[6/] Notwithstanding the Commission's relatively quick resolution of the BVS complaint, the fact remains that BVS was unable to offer the same programming as its competitors for *ten months* because the Commission's rules in effect impose no penalty on a vertically integrated programmer for evasive behavior which has the same effect as an outright refusal to sell programming.[7/] For the reasons set forth in the Ameritech Petition and in WCA's initial comments, WCA submits that the availability of a damages remedy in program access cases would alleviate this problem substantially.[8/]

Finally, WCA supports DIRECTV's proposal to expand the scope of this proceeding to include other aspects of the program access rules that warrant additional review.[9/] For example, it clearly is only a matter of time before vertically integrated programmers attempt to evade the program access rules by distributing programming via fiber rather than satellite. Cablevision

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[6/] *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, CSR-4983-P, DA 97-1452, at ¶¶ 8-9 (rel. Jul. 11, 1997) ["*BVS*"].

[7/] In the *BVS* case, the Bureau only required Rainbow to enter into an affiliation agreement with BVS within 45 days; no other sanctions were imposed. *BVS* at ¶¶ 29-30.

[8/] WCA Comments at 14-18.

[9/] Comments of DIRECTV, Inc., RM-9097, at 3-4 (filed Jul. 2, 1997).

Systems Corp., which controls the rights to virtually all major sports programming in the New York City metropolitan area and is "the uncontested powerhouse of televisions sports," has already begun an aggressive program at evading the program access rules.[10/] *The New York Times* has reported that:

> Even now, Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission.

Were the Commission to postpone a review of applying the program access rules to those who migrate programming from satellite to other distribution media until land-based distribution occurs, alternative MVPDs could be denied access to programming for years while the Commission conducts the required rulemaking proceeding. By dealing with this issue now, the Commission can put into place a regulatory regime that will enable it to take quick action in the likely event that distribution of cable programming via fiber becomes a reality.

In addition, the Commission should use the Ameritech Petition as an opportunity to develop a record as to whether the program access rules should encompass the activities of non-vertically integrated programmers. As pointed out in WCA's initial comments, the expansion of joint ventures between programmers not traditionally considered to be vertically integrated (*e.g.*, Fox and Microsoft) and highly vertically integrated cable operators (*e.g.*,TCI, Time Warner, Cablevision and Comcast) will have a chilling effect on the willingness of cable programmers to sell to alternative

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[10/] Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *N.Y. Times*, Financial P. 1 (April 27, 1997)("Cablevision [has] full ownership of the Knicks and Rangers sports teams and of the MSG cable network, as well as of the [Madison Square Garden] arena itself. Coupled with the cable rights it already has to five major New York area professional teams -- the Yankees, Mets, Devils, Nets and Islanders -- Cablevision has become the uncontested powerhouse of televisions sports.").

MVPDs.[11/] The Commission's program access rules cannot be completely effective unless the potential impact of these new relationships are taken into account *before* they produce the very types of anticompetitive conduct that the program access rules are supposed to prevent. Accordingly, a proactive approach to this issue is warranted if the Commission intends to maintain a regulatory framework that minimized barriers to market entry by wireless cable operators and other alternative sources of multichannel video programming.

[11/] WCA Comments at 7-8.

WHEREFORE, the Wireless Cable Association International, Inc. respectfully requests that the Commission issue a *Notice of Proposed Rulemaking* in this proceeding in accordance with its initial comments in this proceeding and in the reply comments set forth above.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
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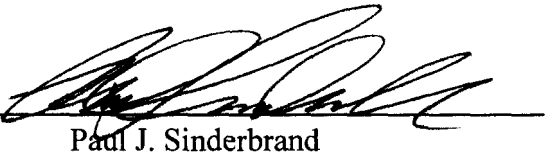
By: 

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July 17, 1997

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